NO. 95205-1

SUPREME COURT OF THE STATE OF WASHINGTON

GROUP HEALTH COOPERATIVE,

Petitioner,

v.

CHRISTOPHER H. FLOETING,

Respondent.

AMICI CURIAE BRIEF OF UNIVERSITY OF WASHINGTON, WASHINGTON STATE UNIVERSITY, CENTRAL WASHINGTON UNIVERSITY, EASTERN WASHINGTON UNIVERSITY, WESTERN WASHINGTON UNIVERSITY & THE EVERGREEN STATE COLLEGE

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I. INTRODUCTION

Washington's public higher education institutions are committed to eradicating sexual harassment and gender discrimination consistent with the Washington Law Against Discrimination (the WLAD), RCW 49.60, and federal law. They are also committed to protecting the First Amendment rights of their students, faculty, and professional staff. The Court of Appeals' approach to sexual harassment in public accommodations, if applied to public colleges and universities, could lead to irreconcilable conflicts between these important goals. Therefore, this Court should either adopt a narrower definition of sexual harassment consistent with federal law, or (if it adopts the Court of Appeals' standard) make clear that any broader standard would not necessarily apply in an educational setting.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, and The Evergreen State College (collectively "Universities") submit this Amicus Brief. The Universities are the four-year public institutions of higher education in the state of Washington. RCW 28B.20.010 (University of Washington); RCW 28B.30.010 (Washington State University); RCW 28B.35.010 (Central Washington

University, Eastern Washington University, Western Washington University); RCW 28B.40.010 (The Evergreen State College). The Universities, collectively, educate more than one hundred thousand students every year.

The Universities are places of public accommodation and their students are protected from discrimination under RCW 49.60.215(1). RCW 49.60.040(2) (defining places of public accommodation to include educational institutions). The Universities fully support the goal of eradicating discrimination, including sexual harassment, in places of public accommodation, and are deeply committed to providing educational environments free of discrimination and preventing sexual harassment.[1]

[1] Adoption of non-discrimination and sexual harassment policies is just one of the ways that the Universities endeavor to cultivate campuses free of discrimination. *See* University of Washington, Non-Discrimination and Sexual Harassment Policy, https://www.washington.edu/research/or/office-research-central-intranet/policies-and-procedures/non-discrimination-sexual-harassment-policy/ (last visited May 14, 2018); Washington State University, Policy Prohibiting Discrimination, Sexual Harassment, and Sexual Misconduct, https://policies.wsu.edu/prf/index/manuals/executive-policy-manual-contents/ep15-discrimination-sexual-harassment-sexual-misconduct/ (last visited May 14, 2018); Central Washington University, CWUP 2-35 Equal Opportunity Policies and Programs, http://www.cwu.edu/resources-reports/cwup-2-35-equal-opportunity-policies-and-programs, (last visited May 14, 2018); Eastern Washington University, EWU 402-01: Discrimination, Sexual Harassment & Sexual & Interpersonal Violence, https://sites.ewu.edu/policies/policies-and-procedures/ewu-402-01-discrimination-sexual-harassment-sexual-interpersonal-violence/ (last visited May 14, 2018); Western Washington University, Preventing and Responding to Sex Discrimination, Including Sexual Misconduct, http://www.wwu.edu/newfaculty/documents/POL-U1600.04%20Preventing%20Sexual%20Misconduct.pdf#search=harassment%20policy (last visited May 14, 2018); The Evergreen State College, Sexual Harassment and Sexual Misconduct Policy, https://www.evergreen.edu/policy/sexual-harassment-misconduct (last visited May 14, 2018).

The Universities are concerned, however, that the Court of Appeals' decision in *Floeting v. Group Health Cooperative*, 200 Wn. App. 758, 403 P.3d 559 (2017), will interfere with the State's obligation to protect free speech and academic freedom in accordance with the First Amendment. The federal courts have gone to great lengths to protect First Amendment freedoms in the university context because of universities' unique role in society. As noted by the United States Supreme Court:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

Keyishian v. Bd. of Regents of Univ. of the State of N.Y., 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967) (internal citations and quotation marks omitted).

This Court's definition of what constitutes sexual harassment in places of public accommodation could have a significant impact on the Universities' relationships with their faculty and students. If the Court fails to account for First Amendment limitations on the ability to regulate speech, it will be difficult, if not impossible, for the Universities to reconcile their responsibility to prevent violations of the WLAD and the limitations the

First Amendment places on their ability to regulate their employees' and students' speech. The Universities offer their view on the impact of the First Amendment in defining what constitutes sexual harassment to assist the Court with setting the standard for what constitutes hostile environment sexual harassment under the WLAD.

III. ISSUE PRESENTED BY AMICI

Should the definition of sexual harassment under RCW 49.60.215(1) take into account the unique circumstances of educational institutions so as not to prohibit speech or expressive conduct protected by the First Amendment?

IV. ARGUMENT

A. Universities Face Unique Challenges in Seeking to Eradicate Discrimination While Also Protecting Free Expression

Free speech is "the lifeblood of academic freedom," so universities must be particularly concerned about protecting free speech on campuses and in classrooms. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). The Universities are also places of public accommodation under the WLAD, and subject to claims of discrimination under its provisions. RCW 49.60.215(1).

Under federal case law, harassing and offensive speech, while repugnant, is not categorically exempt from First Amendment protections.

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001). *See also Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391-92 (4th Cir. 1993) (determining an "ugly woman contest" at a university was inherently expressive and protected by the First Amendment).

First Amendment protections with respect to faculty speech are most significant when scholarship or teaching relevant to the subject of a class are involved. Thus, allegations of discrimination in that context deserve special attention. *See Demers v. Austin*, 746 F.3d 402, 410-13 (9th Cir. 2014) (determining that academic freedom requires an exception to the general rule that public employees are not entitled to First Amendment protection for speech related to their employment); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (use of profane and offensive language was protected by the First Amendment because it was germane to the class topic of the power and effect of language); *Bonnell v. Lorenzo*, 241 F.3d 800, 820-21 (6th Cir. 2001) (use of profane and offensive language was not protected by the First Amendment because it was not germane to the subject matter in violation of the college's sexual harassment policy).

For example, in *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), a female student felt sexually harassed during

a class when the professor repeatedly focused on topics of a sexual nature and required students to write papers defining pornography. *Id.* at 970. The student filed a sexual harassment complaint with the college and the faculty member was disciplined for creating a hostile learning environment. *Id.* at 971. The faculty member sued the college for violating his First Amendment rights. The Ninth Circuit struck down the college's policy on sexual harassment as void for vagueness, noting "[i]t is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand." *Id.* at 972.

In *Saxe*, the "hostile environment" prong of a school's anti-harassment policy did not require any threshold showing of severity or pervasiveness. The court held that it could therefore be applied to cover much "core" political and religious speech. *Saxe*, 240 F.3d at 217.

These cases provide a real-world cautionary framework for analyzing when antidiscrimination policies can intrude on First Amendment rights in an educational setting. Whatever rule the Court adopts here should account for this tension. Adoption of a severe or pervasive, and objectively offensive, standard is one way to avoid conflict with First Amendment principles in academic settings. Another would be to make clear that if the Court adopts a broader rule, it would not automatically apply in educational settings.

B. One Way to Address the Tension Between Free Speech Principles in the Academic Setting and Harassment Under the WLAD Would Be to Apply the Existing Severe or Pervasive and Objectively Offensive Standard

In the university setting, the definition of what constitutes sexual harassment must be "qualified with a standard akin to a severe or pervasive requirement" or it may "suppress core protected speech." *DeJohn*, 537 F.3d at 320. In *DeJohn*, a court struck down a university's policy prohibiting conduct of a sexual nature that had the purpose or effect of creating an intimidating, hostile, or offensive environment as being overly broad and prohibiting protected speech. *Id.* at 319-20. The court stated, "[a]bsent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—the policy provides no shelter for core protected speech." *Id.* at 317-18.

Federal courts have already addressed what constitutes verbal sexual harassment for purposes of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17, and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688. In both instances, courts have required conduct to be severe or pervasive and objectively offensive in a way that impacts the victim to constitute sexual harassment.

If the Court adopts a similar standard under the WLAD, it would help avoid situations where the WLAD would lead to First Amendment concerns.

1. Title VII of the Civil Rights Act

Title VII, which applies in the context of employment, prohibits hostile work environments based on sex. To constitute a sexually hostile work environment, conduct or speech must be (1) unwelcome conduct subjectively perceived as harassment by the victim, and (2) objectively severe or pervasive enough to create an abusive working environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). This concept arose from an understanding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (alterations in original).

The severe or pervasive standard was adopted by this Court for hostile environment sexual harassment employment claims under the

WLAD in 1985. [2] *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). Following Title VII jurisprudence, the Court reviewed whether the harassment was "sufficiently severe and persistent to seriously affect the emotional or psychological well-being of an employee." *Id.* at 406. It also asked whether the conduct was "sufficiently pervasive so as to alter the conditions of employment." *Id*. Whether conduct rises to such level is "determined with regard to the totality of the circumstances." *Id.* at 406-07.[3]

2. Title IX of the Education Amendments of 1972

Title IX broadly prohibits discrimination based on sex, including sexual harassment, in educational programs and activities. 20 U.S.C. § 1681(a). This prohibition extends to educational institutions' relationships with their students, similar to RCW 49.60.215. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992) (Title IX claim brought by a student against a high school for sexual harassment by a coach/teacher). Title IX has led

[2] As recognized recently by the Third Circuit, courts have confused these terms and even used different standards within the same opinions. *Castleberry v. STI Grp.*, 863 F.3d 259, 263-64 (3d Cir. 2017) (clarifying the correct standard is severe or pervasive). For purposes of this brief, the Universities argue that the severe or pervasive standard set forth in *Meritor*, 477 U.S. at 67, should be adopted.

[3] The court also determined that when a hostile environment is caused by a co-worker, the employer is liable if the employer "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *Glasgow*, 103 Wn.2d at 407.

universities throughout the nation to enact robust policies and programs with the goal of eradicating sexual harassment on campuses. *See, e.g., supra* note 1, at 2.

The United States Supreme Court adopted the Title VII standard for defining what constitutes hostile environment sexual harassment for Title IX. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ*., 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). The Supreme Court adopted the test from *Meritor Savings Bank*, but framed it as requiring that the harassment be sufficiently severe, pervasive, and objectively offensive that the victim is effectively denied equal access to an institution's resources and opportunities. *Id.* at 651. The Court also recognized that a single instance of sufficiently severe harassment could have the effect of denying equal access to the educational program or activity. *Id*. at 653.

Educational institutions may be liable for damages under Title IX if the educational institution was "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. *S.S. v. Alexander*, 143 Wn. App. 75, 94, 177 P.3d 724 (2008).

The prohibition against sexual harassment in places of public accommodation under the WLAD shares many similarities with the prohibition under Title IX. the WLAD prohibits places of public accommodation from committing acts that result "in any distinction, restriction, or discrimination." RCW 49.60.215(1). This "statute's primary thrust is to the refusing or withholding of admission in places of public accommodation, and the use of their facilities on an equal footing with all others." *Evergreen Sch. Dist. v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 777, 695 P.2d 999 (1985). Similarly, Title IX broadly prohibits discrimination based on sex in educational programs and activities: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ." 20 U.S.C. § 1681(a). While the language is slightly different, both prohibit discrimination by denying, restricting, or excluding someone from a place of accommodation or activity based on sex. Thus, even if the Court determines Title VII jurisprudence is not persuasive, Title IX jurisprudence is analogous and the Court should consider aligning the standard for liability under RCW 49.60.215(1) with the standard under Title IX, at least in the university setting.

Alignment of the standards for defining hostile environment sexual harassment would help strike the delicate balance between protecting against discrimination and protecting First Amendment interests in education. By adopting these standards for public accommodation cases under the WLAD, the Court would avoid the risk of unconstitutionally burdening protected speech and potentially forcing colleges and universities to choose between complying with the First Amendment or the WLAD.

C. Adoption of a New Sexual Harassment Standard Without Recognizing the Potential Need for a Different Rule for Universities May Place the Universities in a Position of Choosing Between Complying with the WLAD or the First Amendment

Clarity about the legal standard applicable to hostile environment sexual harassment in public accommodations is crucial to the Universities' ability to eradicate discrimination in the educational context. Adoption of a standard that is inconsistent with RCW 49.60.180, Title VII, and Title IX, would create unnecessary confusion and make it difficult to adopt clear policies that adequately protect members of the campus community from sexual harassment without running afoul of the First Amendment.

The WLAD does not define "discrimination." *See* RCW 49.60.040. Analyzing whether or not sexual harassment is a form of sex discrimination, the court below looked to RCW 49.60.180, Title VII, and Title IX. *Floeting*, 200 Wn. App. at 765-66. Yet, when it defined hostile environment

sexual harassment, it rejected the definition of discrimination developed for RCW 49.60.180, Title VII, and Title IX. Instead, it fashioned a new standard that a reasonable person of "the plaintiff's protected class, under the same circumstances, would feel discriminated against." *Id.* at 774.

The Court of Appeals then explicitly rejected a severe and pervasive standard as having "no place" in a claim for discrimination in a place of public accommodation.[4] *Id.* at 775. Further muddying the waters, the court suggested that a single act of conduct could be "egregious enough" to establish liability. *Id*. Conduct could also take the form of a series of acts or events. *Id*. Arguably, these components of the new standard are synonymous with the existing severe or pervasive standard. However, use of different terms creates confusion and ambiguity, particularly in light of the court's explicit rejection of the terms severe and pervasive.

The Court of Appeals' new definition of hostile environment sexual harassment applies not just to the facts of the case before it, but also to any sexual harassment lawsuit brought under the public accommodation section of the WLAD. *Id.* at 774. The new standard could easily place universities in a position where they might be liable under the WLAD for a professor's classroom comment that was offensive (even egregiously offensive) to

[4] As noted above, courts have been inconsistent in their use of the conjunctive and disjunctive when discussing the severe, pervasive standard; the Universities believe the Court should adopt the disjunctive.

students, but also potentially liable under the First Amendment if they prevented the professor from making such comments. *See Hardy*, 260 F.3d at 679; *Bonnell*, 241 F.3d at 820-21; *see also Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 493-94, 166 P.3d 1174 (2007); *Sanders v. City of Seattle*, 160 Wn.2d 198, 224, 156 P.3d 874 (2007); *Bering v. SHARE*, 106 Wn.2d 212, 242, 721 P.2d 918 (1986).[5]

As the Court of Appeals identified in 1985, too broad of a reading of the WLAD would make the reading of certain literary classics in a classroom a violation of the WLAD and, "[a]rguably, these efforts implicate the 'delicate balance' between one's civil rights and other fundamental freedoms, such as that of speech." *Evergreen*, 39 Wn. App. at 776. For example, a feminist theory course that focuses on the male novelists' demeaning treatment or marginalization of female characters could

[5] Without a clear legal standard, the Universities also face the difficult task of adopting policies that effectively prohibit sexual harassment without conflicting with the stringent prohibition on prior restraints contained in Washington's Constitution. *See Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 802, 231 P.3d 166 (2010) (defining a prior restraint as a prohibition on future speech or an official restriction imposed on future speech); *State v. J-R Distribs.*, 111 Wn.2d 764, 776, 765 P.2d 281 (1988) (defining prior restraint as any form of government action which tends to suppress or interfere with speech activity, including official restrictions imposed before the activity, or a complete ban on protected activities). Ironically, rather than furthering the goal of eradicating discrimination, failure to align the standards in the educational context could actually frustrate that goal by making it more difficult for Universities to walk the tightrope between prior restraint and prohibiting oral and written expression that constitutes harassment.

result in discussions that would make reasonable, young adult males "feel discriminated against." Similarly, the discussions of texts depicting demeaning treatment of female characters could cause a young adult female to "feel discriminated against." Despite the academic value of learning about the first wave of feminist theory, these feelings, if reasonable for these young adults in a classroom, could make the university directly liable for discrimination under the WLAD under the Court of Appeals' reasoning.

"Being very upset that a faculty member or student said something hateful, offensive, or ignorant cannot transform protected speech into harassment without fatally undermining free speech protections." Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* 122 (2017). Applying the Court of Appeals' new standard to the educational setting would implicate free speech and academic freedom. The Court should therefore adopt a definition of hostile environment sexual harassment for the WLAD claims against places of public accommodation similar to the standard used under Title VII and Title IX, or make clear that any broader definition would not apply to universities.

V. CONCLUSION

A broad rule abandoning the traditional definition of hostile environment sexual harassment in all public accommodation settings may have unintended consequences where universities must also ensure fidelity

to First Amendment principles. Adoption of the severe or pervasive, and objectively offensive, standard already established in state and federal discrimination jurisprudence furthers the goal of eradicating sexual discrimination in public accommodations while also enabling the Universities to support the free speech of its students and faculty. Accordingly, the Court should determine that, to be actionable under the WLAD, conduct must be sufficiently severe or pervasive, and objectively offensive, that it denies, restricts, or interferes with someone's ability to enjoy or participate in a place of public accommodation on the basis of sex. If the Court adopts a different standard, it should be fashioned with consideration of the unique concerns presented in the academic setting. Alternatively, the Court should make clear that the standard may not apply in an academic setting, given these unique concerns.

RESPECTFULLY SUBMITTED this 14th day of May 2018.

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CERTIFICATE OF SERVICE

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